Local 233, Operative Plasterers and Cement Masons, International Association of the United States and Canada, AFL-CIO-CLC *and* Strescon Industries, Inc. and International Union of Bricklayers and Allied Craftsmen, AFL-CIO, and Laborers International Union of North America, AFL-CIO. Case 4-CD-598

27 January 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS ZIMMERMAN AND HUNTER

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, herein called the Act, following a charge filed by Strescon Industries, Inc., herein called the Employer, alleging that Local 233, Operative Plasterers and Cement Masons, International Association of the United States and Canada, AFL-CIO-CLC, herein called Cement Masons, had violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring the Employer to assign certain work to its members rather than to employees represented by International Union of Bricklayers and Allied Craftsmen, AFL-CIO, herein called Bricklayers, and by Laborers International Union of North America, AFL-CIO, herein called Laborers.

Pursuant to notice, a hearing was held before Hearing Officer David Faye on 15 July 1983.[1] The Employer, Cement Masons, Bricklayers, and Laborers appeared and were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues. At the hearing, the parties stipulated that the record in *Plasterers Local 233 (Strescon Industries)*, Cases 4-CD-569 and 4-CD-592,[2] be incorporated as part of the record in this matter. Indeed, apart from the record in the foregoing proceeding, the parties presented no evidence pertaining to the merits of the instant dispute.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the hearing officer's rulings made at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings.

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that the Employer, a Maryland corporation with its principal place of business located in Baltimore, Maryland, is engaged in the business of manufacturing and erecting prestressed and precast concrete products. During the preceding 12 months, a representative period, the Employer performed services in excess of $50,000 directly to customers outside the State of Maryland. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATIONS INVOLVED

The parties stipulated, and we find, that Cement Masons, Laborers, and Bricklayers are labor organizations within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

At all times material herein, the Employer has been engaged as a subcontractor, under a contract to Alvin H. Butz, general contractor, to manufacture and install hollow core concrete planks in the contruction of the Phoebe Terrace Life Care Center in Allentown, Pennsylvania, herein called the Phoebe Terrace jobsite. On a date not specified in the record, the Employer hired seven employees to perform this work, including three employees in job classifications as bricklayers, two as laborers, and two as operating engineers. On or about 31 May, performance of grouting work began. As of the date of the hearing, 80 percent of the grouting work had been completed. The parties anticipated that the grouting work would be completed within approximately 2 weeks. Patching work had not yet begun as of the date of the hearing, but the parties anticipated that the patching work would begin on or about 15 September. It is unknown when the patching work will be completed. On either 31 May or 1 June, Cement Masons learned that it did not receive the assignment of the work in dispute. The parties stipulated that the work remains in dispute.

The parties stipulated for purposes of the instant proceeding only that, on or about 26 May and on or about 2 June, Cement Masons threatened the Employer with picketing at the Phoebe Terrace jobsite if the Employer failed and refused to reassign the disputed work to individuals who are members of, or represented by, Cement Masons, and that, on or about 27 June, Cement Masons en-

[1] All dates hereinafter are in 1983 unless noted otherwise.
[2] 267 NLRB 724 (1983.)

gaged in picketing at the Phoebe Terrace jobsite.[3] The parties further stipulated for purposes of the instant proceeding only that an object of Cement Masons' conduct was and is to force or require the Employer to assign the disputed grouting and patching work of hollow core concrete panels at the Phoebe Terrace jobsite to employees who are members of, or are represented by, Cement Masons rather than to employees who are members of, or are represented by, another labor organization, and there is reasonable cause to believe that Section 8(b)(4)(D) of the Act has been violated.

B. *The Work in Dispute*

The work in dispute involves the grouting and patching of hollow core concrete planks for Strescon Industries at the Phoebe Terrace Life Care Center construction site in Allentown, Pennsylvania.

C. *Contentions of the Parties*

As contended previously in Cases 4–CD–569 and 4–CD–592, the Employer asserts that its assignment of the work in dispute to employees represented by Bricklayers and Laborers is supported by the governing collective-bargaining agreement and its past practice of assigning the grouting and patching work to employees represented by Bricklayers and Laborers. The Employer asserts further that, by virtue of their past experience performing the disputed work, bricklayers and laborers have acquired superior skills. Finally, the Employer argues that bricklayers and laborers will perform the disputed work more economically and efficiently.

Cement Masons contends that area practice supports an award of the disputed work to employees it represents. Cement Masons also takes the position that its members possess the skills necessary to perform the disputed work. Cement Masons maintains that its dispute is with Bricklayers only.

Bricklayers and Laborers take the position that their collective-bargaining agreement with the Employer entitles their members to the disputed work, and that the specific provision of that agreement treating the disputed work assigns it to members of their Unions as one unit.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is clear from the record summarized above that Cement Masons claimed the work in dispute and threatened to picket and did in fact picket the Phoebe Terrace jobsite with the object of forcing the reassignment of work from employees represented by another labor organization to employees represented by Cement Masons. Indeed, the parties stipulated that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated.

In addition, the parties stipulated that there is no agreed-upon method for the voluntary adjustment of the work in dispute which would bind all parties.

On the basis of the entire record, we conclude that there is reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred and that there exists no agreed-upon method for the voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that this dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of disputed work after giving due consideration to various factors.[4] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on commonsense and experience reached by balancing those factors involved in a particular case.[5]

The following factors are relevant in making the determination of the dispute before us.

1. Collective-bargaining agreements

The record contains a collective-bargaining agreement entered into on 10 April 1962 between the Employer's predecessor, Baltimore Concrete Plant Corporation, and International Hod Carriers' Building and Common Laborers' Union of America, AFL–CIO, and Bricklayers, Masons and Plasterers International Union of America, the predecessors of Laborers and Bricklayers, respectively.

[3] On 17 June, as amended on 30 June, the Acting Regional Director for Region 4 filed a petition under Sec. 10(l) of the Act with the U.S. District Court for the Eastern District of Pennsylvania seeking an injunction against certain conduct of Cement Masons pertaining to the grouting and patching work at the Phoebe Terrace jobsite. On 7 July, the court granted the injunction ordering Cement Masons to refrain, inter alia, from picketing or threatening to picket at the Phoebe Terrace jobsite for an object proscribed under the Act.

[4] *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

[5] *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

This agreement specifically discusses the work in dispute. Article IV provides in relevant part:

> It is agreed that Laborers will unload, handle, and place precast, prestressed masonry products. Setting, plumbing, leveling, aligning, pointing, caulking, and grouting and anchoring by any and all means shall be the work of the bricklayers with laborers tending.

Both Laborers and the Employer assert that article IV constitutes a joint assignment of the disputed work to employees represented by Bricklayers and Laborers. Joe Erickson, the Employer's operations manager for northern and southern division, testified in Cases 4–CD–569 and 4–CD–592 that the Employer has assigned grouting and patching work in accordance with the terms of this agreement, that is, to bricklayers and laborers jointly, since he began working for the Employer in 1973. Erickson further testified that the Employer has never had a contract with Cement Masons.

We conclude that the Employer's agreement with Bricklayers and Laborers favors an award of the disputed work to employees represented by those two unions.

2. Employer's preference and past practice

The Employer assigned the work in dispute to employees working in job classifications as bricklayers and laborers. The record reveals that the Employer is satisfied with, and maintains a preference for, this assignment.

Erickson testified in Cases 4–CD–569 and 4–CD–592 that it has been the Employer's consistent practice to assign grouting and patching work to a composite crew of bricklayers and laborers hired out of Baltimore. Erickson testified that most of the employees who perform such work for the Employer are long-term employees. He testified that the bricklayers who are members of this crew have worked for the Employer on the average of 15 years.

Since the Employer operates a multistate operation, it frequently assigns grouting and patching work to its crew of bricklayers and laborers, even though it is beyond the jurisdiction of the employees' local hiring hall. When such an assignment is made, the agreement discussed, supra, provides that the Employer's employees will receive the same wages and conditions of employment as those in effect for members of the union in the locality in which they are working. In addition, the Employer will sometimes supplement its standard crew with employees referred by the local hiring hall.

We conclude that the factors of the Employer's preference and past practice support an award of the disputed work to employees represented by Bricklayers and Laborers.

3. Economy and efficiency of operations

Because the Employer regularly employs a composite crew consisting essentially of laborers and bricklayers whom it has hired in the past, that composite crew is able to work in an integrated and interchangeable fashion on the various phases of grouting and patching work. The record also discloses that this composite crew is able to perform other tasks in addition to the disputed work, which prevents the expense of "idle time." Thus, the composite crew of laborers and bricklayers enhances both the efficiency and economy of operations in the present dispute.

Although cement masons possess the requisite skills to perform the disputed work, they did not demonstrate the flexibility, versatility, and experience with the Employer's operations which the composite crew affords the Employer.

Accordingly, the factor of economy and efficiency of operations tends to favor an award of the disputed work to employees represented by Bricklayers and Laborers.

4. Area practice

Erickson testified in Cases 4–CD–569 and 4–CD–592 that the Employer had performed grouting and patching work in the Allentown area in the past and that on those occasions the Employer had employed bricklayers and laborers. Erickson, however, was unable to specify a particular project by name or date.

Harry Good, business agent for Cement Masons, testified in that proceeding that employees represented by Cement Masons historically have performed all grouting and patching work performed within the Allentown area. He based his testimony on Cement Masons' constitution and his personal observations. Jerome Gearhart, president of Cement Masons Local 233, also testified in Cases 4–CD–569 and 4–CD–592 that the traditional practice in the Allentown area is to assign grouting and patching work to employees represented by Cement Masons. Both Good and Gearhart specified sites in the Allentown area where cement masons (including themselves) had performed grouting and patching work. In addition, Good testified that he had never seen a bricklayer performing such work.

Although there is conflicting testimony, we find that the evidence regarding this factor tends to

support an award of the disputed work to employees represented by Cement Masons.[6]

5. Relative skills

The record establishes that no special skills are required to perform grouting and patching work and that either group of employees possesses the requisite skills to perform such work. We therefore find that this factor is inconclusive and does not favor an award to employees represented by any of the Unions involved.

Conclusion

Upon the record as a whole, and after full consideration of all relevant factors involved, we conclude that consistent with our award in Cases 4–CD–459 and 4–CD–592, employees who are represented by Bricklayers and Laborers are entitled to perform the work in dispute. Members of these two Unions are skilled in performing the disputed work and are familiar with the Employer's mode of operation. The assignment of work to bricklayers and laborers reflects the Employer's agreement with Bricklayers and Laborers as well as its past practice of at least 10 years. Such an assignment also results in a more efficient operation. Although area practice, normally accorded great weight in construction industry cases,[7] does tend to favor an award to employees represented by Cement Masons, we note that it is the *only* factor favoring such an award. Moreover, given the conflict in testimony and lack of documentary evidence, the record in the instant case does not establish the well-defined area practice which we ordinarily are reluctant to disturb. Accordingly, we find that area practice fails to offset the other relevant factors considered in this case;[8] indeed, those factors, together with the record evidence that the Employer's composite crew routinely moves from jobsite to jobsite within a multistate area, clearly favor an award to employees represented by Bricklayers and Laborers. In making this determination we are awarding the work in question to employees represented by Bricklayers and Laborers but not to those Unions or their members. The present determination is limited to the particular controversy which gave rise to this proceeding.

[6] None of the parties introduced documentary evidence to support its position.

[7] See *Carpenters Local 171 (Knowlton Construction)*, 207 NLRB 406 (1973).

[8] In *Carpenters Local 171*, supra, employer preference was the *only* factor in conflict with what was determined in that case to be a well-defined area practice.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Strescon Industries, Inc., who are represented by International Union of Bricklayers and Allied Craftsmen, AFL–CIO, and by Laborers International Union of North America, AFL–CIO, are entitled to perform the grouting and patching of hollow core concrete planks at the Phoebe Terrace Life Care Center construction site located in Allentown, Pennsylvania.

2. Local 233, Operative Plasterers and Cement Masons, International Association of the United States and Canada, AFL–CIO–CLC, is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require Strescon Industries, Inc., to assign the disputed work to employees represented by that labor organization.

3. Within 10 days from the date of this Decision and Determination of Dispute, Local 233, Operative Plasterers and Cement Masons, International Association of the United States and Canada, AFL–CIO–CLC, shall notify the Regional Director for Region 4, in writing, whether or not it will refrain from forcing or requiring the Employer, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with the above determination.